Comments on the Proposed TMDL Regulations

130.0 Program Summary and Purpose

ISSUE: In (a), the statement that the Water Quality Management process is, **A.....implemented jointly by EPA, the States, interstate agencies, and areawide, local and regional planning organizations@.**

COMMENT: EPA should clarify the roles of planning organizations in implementing TMDLs.

ISSUE: In (f), EPA indicates that it, **A....will focus its grant funds on activities designed to address these (water quality issue) priorities.@ , and that AAnnual work plans negotiated between EPA and State agencies will reflect that emphasis.@**

COMMENT: EPA should identify the grant funds that are to be focused upon and to clarify that States who have entered into Environmental Performance Partnerships with EPA are not required to produce annual work plans.

130.2 Definitions

(c) Pollution and (d) Pollutant:

ISSUE: In the proposed rules, the distinctions between the two terms are ambiguous, confusing, and without good examples. Is there a need for both terms?

COMMENT: EPA needs to provide clarification and much more guidance regarding these definitions. The pollution definition is particularly vague. IDEM does not necessarily see the need for the distinction.

(m) Impaired waterbody:

ISSUE: Using the definition to identify an impaired waterbody.

COMMENT: On the surface, it appears the definition of an impaired waterbody is straightforward. Identifying an impaired waterbody using this definition should be a simple matter of reviewing actual or predictive water quality data and, when the data shows that the waterbody does not attain water quality standards, deeming it impaired and placing it on the 303(d) list.

In reality, this is not a simple matter. A waterbody, by nature, is dynamic. Water quality changes constantly due to rainfall, lack of rainfall, snow melt, point source discharges, and flood control measures, to name a few. A waterbody will be attaining water quality standards one minute and the next minute the same waterbody will be impaired. Therefore, a time consideration must be factored into the equation to determine if a waterbody is impaired.

There is usually a considerable difference in water quality between dry and wet weather

stream conditions. During dry weather, the flow in a stream basically consists of water from ground water infiltration and point source discharges. Stream quality data that is available in Indiana tends to show that the water quality during dry weather flow is generally high, meaning the waterbody is attaining the standards. Conversely, during wet weather conditions, the flow in a stream is made up of ground water infiltration, point source discharges (including storm sewers and combined sewers), agricultural and urban storm water runoff, and other nonpoint sources. The water quality during wet weather conditions can be low, meaning the waterbody is more polluted than during dry weather. Actually, a waterbody has a greater chance of being impaired during wet weather than during dry weather. This assumes that the point sources are in compliance.

One method that could be used to avoid this conundrum would be to combine wet and dry weather ambient data and calculate an average to determine if the waterbody was impaired. But, in IDEM=s opinion, this would not be a reasonable approach. To explain, the NPDES permitting program is a dry weather protection program. NPDES permit limits to protect aquatic life are based on protecting water quality at the Q7,10 stream flow (a.k.a. low flow) so discharges will not harm aquatic life at what has traditionally been considered the waterbody's most vulnerable time period (during dry weather conditions). Using the average of wet and dry weather data to determine if a waterbody is impaired is misleading when considering NPDES permits are based on protecting the waterbody during dry weather.

Previous EPA guidance on implementing TMDLs mentioned determining the "critical flow" of a waterbody. The "critical flow" was defined as the point in time that a waterbody was impaired. This term was important in that it provided the States the opportunity to determine when a waterbody was impaired and, in turn, be able to determine the probable source of the impairment. This proposed rule does not contain this flow determination. The definition in this rule should provide some type of time period upon which a State can make the impaired determination. As it is, the definition is not adequate. Of course, a State could set up its water quality monitoring program, as required by 40 CFR 130.10, to direct its focus on the data that would be evaluated to make the "impaired" determination. If that is what EPA intends by this proposed rule, the rule should clearly state that that is the purpose.

(p) Reasonable Assurance

ISSUE: EPA is requiring that states demonstrate that each wasteload allocation and load allocation will be implemented. The nonpoint source demonstration requires states to identify specific procedures and mechanisms to insure nonpoint source controls will be implemented.

COMMENT: The ability of a state to meet the ***wasteload allocation*** (point source) reasonable assurance test is generally an achievable requirement. Ensuring that the ***load allocation*** (nonpoint source) portion of this test will be difficult and in many instances will not be possible.

Also, the provisions should recognize the difficulty in providing reasonable assurance for the elimination of impairments caused by legacy pollutants present in the sediments for which no known point or nonpoint source exists.

EPA should not force states to be held accountable for the failure of implementing any nonpoint source control over which we have no direct regulation. Unless EPA sets out very clear mechanisms for the enforcement of such controls, we will only be able to rely on cooperation of those entities, if any, who are responsible for managing that source. Reliance on contract law as a substitute for specific nonpoint regulations sets up an enforcement quagmire. Parties who refuse to comply may force states into unfairly reallocating pollutant loadings to point sources. This issue of reasonable assurance for nonpoint source controls, as written, will cause EPA to disapprove many TMDLs, thereby forcing EPA to write the TMDL, including the implementation plan, within 30 days. (Also see 130.33, italics.)

Reasonable assurance will require IDEM to use untested statutory authorities to insure that nonpoint sources comply with the requirements of a TMDL.

This will require a major shift in how IDEM enforces water quality violations. In order for a TMDL to be successful, the nonpoint source contributors to violations of water quality standards will have to be held accountable for their pollutant load. IDEM must be able to venture into nonpoint source enforcement, and make those water quality violations as important as those caused by point source dischargers. In many cases, the violators may be farmers, private homeowners, small businesses or small unincorporated communities.

This rule should provide great flexibility to the states to accomodate all manner of providing reasonable assurance that actions by nonpoint sources will occur so as to allow development of an effective TMDL.

130.22 Data and Information to identify and list impaired waterbodies

ISSUE: EPA proposes that states use evaluated and predicted data in determining impairments.

COMMENT: IDEM strongly believes that defensible waterbody data should be the only driving mechanism for listing a waterbody. States should have the flexibility to decide the criteria for defensible data. The use of predictive data will only lead to legal challenge.

130.25 Scope of the List

ISSUE: Threatened waterbodies are to be included on Part 1 of the 303(d) list and a TMDL performed.

COMMENT: IDEM does not believe that threatened waterbodies should be included in this rule. The fact is that all waterbodies are Athreatened@ at some time.

Also, by definition, threatened waters actually do meet water quality standards. They are not, by definition, impaired waters. If threatened waterbodies must be included, the state should be under no obligation to perform a TMDL. In many cases, the problem may be resolvable more effectively and efficiently without having to employ the entire TMDL

process. IDEM=s limited resources should be directed to developing TMDLs only for impaired waterbodies.

130.26 Antidegradation Policy and the List

ISSUE: Listing a Tier 3 waterbody

COMMENT: This provision states that any Tier 3 waterbody will automatically be deemed impaired and must be listed on the 303(d) Part 1 list if the state, at any time, obtains data that shows the quality of the Tier 3 water has declined from the time the water was designated. As stated above, the quality of a waterbody is in constant fluctuation. This provision would not allow for any variability in a Tier 3 water, even if the declined was due to air deposition from sources beyond IDEM=s control. This provision must be revised to allow some statistical variability or it should be deleted.

ISSUE: Listing a Tier 2 waterbody.

COMMENT: As stated in our comment on 130.25 above, IDEM does not believe that threatened waterbodies should be included on the 303(d) list. Therefore, the criteria for listing a Tier 2 waterbody as threatened should be deleted.

ISSUE: Listing a Tier 1 Waterbody

COMMENT: For antidegradation purposes, by definition, a Tier 1 waterbody is impaired. In 130.26(a)(3), the second sentence beginning with "Any Tier 1 waterbody is threatened**Y**" is redundant. If a waterbody is already impaired,. how does including Athreatened@ add any value to this provision.

130.27 Format of the List

ISSUE: EPA is proposing that the List should be made up of four parts. TMDLs are required for waterbodies listed on Part 1. Part 2 consists of waterbodies impaired or threatened by pollution (no TMDL required). Part 3 consists of waterbodies for which EPA has approved the TMDL but water quality standards are not yet attained. Part 4 consists of waterbodies that are impaired, and for which the implementation of best practicable control technology and enforceable secondary treatment or controls are expected to result in attainment of water quality standards in the next listing cycle (no TMDL required).

COMMENT: IDEM strongly believes that only impaired waterbodies be identified in Part 1. Again, we need to focus all of our limited resources on waterbodies that are actually impaired. States should be able to manage the other waterbodies as we deem necessary and appropriate. If threatened waterbodies must be included, they should be on a separate list with no obligation to perform a TMDL.

If EPA chooses to keep Athreatened@ in the rule, then (a)(1) needs to have an apparent discrepancy corrected. The last sentence in (a)(1) says, A*A TMDL is required for waterbodies on Part 1 of the list impaired by pollutants.*@ This conflicts with the first sentence in (a)(1) which says, A*Waterbodies impaired or threatened***Y**@. To be consistent,

the last sentence should say, *AYon Part 1 of the list impaired or threatened by pollutants.@*

130.30 List Submission Date

ISSUE: EPA is proposing to change the list submission date and time interval to allow states to focus more on doing TMDLs than preparing lists. This section also gives EPA the authority to prepare a state=s list should EPA disapprove the list, if a state fails to prepare the list, or if a state requests EPA to establish a list.

COMMENTS:

1. IDEM supports a list submission interval of five (5) years and agrees with an October 1 date, with the first list being due 24 months after the rules become effective.

2. IDEM also believes that the rule should state that if EPA fails to review the list and respond back to the state within 30 days, then the list is automatically deemed approved.

3. EPA should work in concert with affected states to develop TMDLs for waterbodies that are affected by contributions of pullutants (waterborne or airborne) from multiple states.

130.31 TMDL Schedule and Submission Date

ISSUE: EPA is proposing to drop the 2 year schedule and allow states up to 15 years to perform a TMDL, once the waterbody is listed.

COMMENT: IDEM agrees with dropping the 2 year schedule commitment. This will allow us to be flexible in the management of our TMDLs in order to shift resources and work more effectively.

In (b), IDEM supports a schedule submission interval of five (5) years and agrees with an October 1 date, with the first schedule being due 24 months after the rules become effective.

130.33 Minimum Elements Required in a TMDL

ISSUE: This section outlines the 10 elements that must be present in the TMDL, including the implementation plan with the reasonable assurance requirements. The inclusion of the implementation plan as a required TMDL element is being debated by many states at this time.

COMMENT: IDEM agrees that the implementation plan needs to be a part of the TMDL, however the reasonable assurance standards are not reasonable with respect to nonpoint source issues, and create a stumbling block for the approval of a TMDL.

In (b)(10)(iii), again we must emphasis that reasonable assurances for load allocations must be revised to recognize and allow for situations over which states have no control or authority.

In (c), how would the Section 316(a) variance provision of the Clean Water Act and the antidegradation provision of this proposed rule work together? (The issue: impairments due to thermal discharges.) Also, having to estimate the total maximum daily thermal load is not an easy task. Just the act of "estimating" leaves the States in a tenuous position.

In (d), define or clarify what is meant by "adverse modification of its designated critical habitat" with respect to the Endangered Species Act.

130.35 Actions by EPA on submitted TMDLs

ISSUE: EPA responsibilities in reviewing TMDLs.

COMMENT: In (b), IDEM believes that the rule should state that if EPA fails to review the TMDL and respond back to the state within 30 days, then the TMDL is automatically deemed approved.

130.36 EPA Establishment of TMDLs

ISSUE: EPA's responsibility in developing TMDLs.

COMMENT: What process would EPA use to make the determination that it would do a TMDL for interstate waters? Also, EPA should work in concert with affected states to develop TMDLs for waterbodies that are affected by contributions of pullutants (waterborne or airborne) from multiple states.

130.50 Continuous Planning Process

ISSUE: EPA states in (c): A**The Regional Administrator shall not approve any permit program under Title IV of the Act for any state which does not have an approved continuing planning process.**@

COMMENT: IDEM does not support this provision. There should be no connection between the approval of a CPP and delegation of permit programs.

40 CFR 131.12 Antidegradation policy - PERMITTING ISSUES

ISSUE: In order to authorize a new discharger or existing discharger with a significant expansion of a pollutant, that is not a small entity, to discharge to a water that is in nonattainment for that pollutant, and for which EPA has not established or approved a TMDL for that pollutant, an offset is required. Any increase in mass loadings of the pollutant must be offset by load reductions of that pollutant by a ratio of at least 1.5:1. There are exceptions to this that allow an offset ratio between 1.5:1 and 1:1 if the lower offset will be sufficient to achieve reasonable further progress; and in instances in which the offset may result in further degradation, the offset need not be required.

COMMENT: IDEM does not believe that this offset provision is in any way Areasonable@ or that EPA has the authority to impose this requirement. The offset provision also

assumes that a source will exist that the new discharger or an existing discharger with a significant expansion of a pollutant will be able to obtain a reduction from. Further, and more importantly, this proposed rule appears to be inconsistent with the recent position taken by EPA regarding this issue in the Great Lakes Water Quality Guidance. IDEM believes this proposed requirement adds unnecessary restrictions on dischargers until the TMDL is developed for the waterbody.

Exception for Small Entities: There is not necessarily a relationship between the size of an entity and the potential impact of that entity=s discharge on the receiving water; therefore, the outright exclusion of all small entities is not appropriate. For example, a small discharge to a small waterbody can have a significant impact on the water quality of that waterbody and cannot be ignored.

Offset: An offset is required for all increases in mass discharged to impaired water bodies (with one exception). However, in instances in which the pollutants being discharged were present in the discharger=s intake, are discharged back into the same body of water, and the discharger does not add, or concentrate those pollutants, it wouldn=t be appropriate to require the discharger to obtain an offset for those intake pollutants.

Reasonable Further Progress: As stated above, for new or increased discharges to impaired water bodies without a TMDL, this proposed regulation appears to be inconsistent with the position taken by EPA regarding this issue in the Great Lakes Water Quality Guidance. The following comments discuss some of these apparent discrepancies:

> (1) In the preamble to this proposed rule, EPA says the Areasonable further progress@ provision is consistent with the goal of the Clean Water Act to restore and maintain the chemical, physical and biological integrity of the Nation=s waters. In the Supplementary Information Document (SID) to the Great Lakes Water Quality Guidance, EPA says that setting the wasteload allocation equal to the criterion for the pollutant causing the impairment is consistent with the goal of the Clean Water Act. If the recommendation in the SID is already consistent with the goal of the Clean Water Act, EPA should not require Areasonable further progress.@ The rule could include this as an option where the loading of the pollutant is of concern.
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> (2) In the SID, EPA explains that, ANumeric criteria are concentration-based standards designed to protect the aquatic ecosystem and humans from the adverse effects of pollutant discharges that would occur at levels above the criteria... where the environmental effects of a pollutant on the aquatic ecosystem or on human health are associated with the concentration of the pollutant in the waterway, limiting discharges from point sources to criteria end-of-pipe in these circumstances should therefore result in no further degradation of the waterbody, and may in fact improve the water quality of the waterbody (special environmental considerations are present with regard to bioaccumulative [persistent] compounds...).@ EPA goes on to explain that, A...allowing discharge at criteria end-of-pipe may actually improve water quality as compared with prohibiting any discharge at all since the former approach may ultimately reduce the pollutant concentration in the receiving water.@ However, in the preamble to

this proposed rule, EPA fails to recognize the importance of pollutant concentrations in the waterbody and focuses only on additional pollutant loadings. This is apparent in your reference to the Clean Air Act where the circumstances are actually completely different between air and water and not at all similar as stated in the preamble. The provision in the Clean Air Act is for a closed system since sources cannot add additional air to the environment. Since air is a closed system, it makes sense to remove pollutants before adding more when the air quality is in non-attainment. However, waterbodies are not closed systems, as additional water, and therefore additional loading capacity, can be added to the waterbody by the discharger. The proposed regulation will discourage or prevent dischargers from locating on impaired waterbodies when their discharge could actually benefit the waterbody.

(3) Based on the SID, wasteload allocations for all discharges (existing, new and increased) to non-attainment waters would be set equal to the water quality criterion for the pollutant causing the impairment. This would result in existing dischargers actually reducing the amount of the pollutant in their discharge. For a discharger with an existing effluent limit above the criterion, any increase in discharge volume may actually be offset by the reduction that will be required to their existing effluent limits. The SID recommendation may prompt dischargers to help expedite the TMDL process rather than have their permit limits decreased.

(4) In the SID, EPA addresses those cases where the addition of mass may be of concern as follows: AIn the interim before a TMDL has been established, EPA believes that any environmental concerns associated with such additions of mass can appropriately be addressed by the permitting authority through interpretation of the >toxics= narrative criterion contained in state water quality standards.@